ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION I

CA07-1000

MARCH 19, 2008

RICHARD B. HUDSON APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. DR-04-518-2]
V.	HON. MIKE MEDLOCK, JUDGE
JENNIFER L. HUDSON APPELLEE	AFFIRMED

Appellant Richard Hudson and appellee Jennifer Hudson were divorced on June 13, 2005. Under the divorce decree, custody of the parties' two minor children was awarded to appellee with visitation to appellant under a modified version of the court's standard order regarding visitation. On March 9, 2006, appellant filed a motion to change custody or to modify the divorce decree in certain respects regarding the children. After a hearing, the trial court denied appellant's motion, finding that appellant had failed to show a material change in circumstances to justify a change of custody. Noting that the parties had experienced some problems with the previous visitation arrangements, the trial court incorporated certain modifications submitted by the parties to the standard visitation order but noted that it would implement the standard visitation order without modification if the parties did not make every

effort to cooperate and comply with the modified visitation order. Appellant argues three points on appeal: (1) the trial court erred in not changing custody to him; (2) the trial court erred in limiting the activities appellant could do with his children during visitation; and (3) the trial court erred in denying his motion for reconsideration. We find no error and affirm.

At the time the divorce decree was entered, appellee had relocated with the children from Pulaski County to Van Buren. On January 12, 2007, the date of the hearing on the petition for modification, the parties' children, Hunter and Heather, were nine and five, respectively. Hunter was in fourth grade. Appellant called Hunter's third-grade teacher, Sherry Jones, to testify. She said that Hunter was an excellent student, although there had been a few behavior problems when Hunter first came to school in Van Buren. While Ms. Jones indicated that there were times that Hunter wrote about missing his dad, she testified that it was a common thing for children from divorced homes to write about living with the other parent and noted that she had never seen anything in the interaction between appellee and her children that would cause her concern. Hunter's teacher during his first year in Van Buren, Mr. McBride, also testified that Hunter had expressed a desire to live with his father.

Christy Lawson, Hunter's school counselor, testified that she had counseled Hunter for emotional and social-skills problems during his first year at the school. She had conferred with appellee to suggest professional counseling, which appellee sought with Dr. Barling. Ms. Lawson then testified that appellee asked her not to see Hunter because Dr. Barling had suggested that it might be confusing. Ms. Lawson also said that many of Hunter's emotional and behavioral problems concerned Hunter's desire to be with appellant.

Appellant testified that he was a fireman and still lived in Roland in the family home. He testified that he had remarried and that, because of his schedule, either he or his parents could be at home with the children when they arrived on the bus from school if they lived with him, rather than having to be in daycare after school in Van Buren. He testified that he hunted and fished with Hunter when Hunter visited. He also testified that he had experienced difficulty with appellee in changing visitation to accommodate his schedule, that appellee did not send suitable clothing when the children visited him, and that he did not understand appellee's concern with allowing Hunter to ride on the fire truck with him during work hours. He also expressed his concern with appellee's failure to inform him about what the Health Department recommended when there was an e. coli outbreak at his children's daycare.

Appellant's mother and father testified that they did not get to see the children as often since the divorce and that there had been problems with contacting the children on the phone. Appellant's brothers, who both lived near appellant and had small children, testified that they did not like seeing appellant's children crying when visitation was over. Appellant's new wife testified that she got along well with appellant's children and complained about appellee sending inappropriate clothing when the children visited.

Appellee testified about her job, the children's daily activities, and various problems that the parties were experiencing concerning phone communication. She also expressed her concern about appellant taking Hunter to work with him and the potential danger when Hunter rode on the fire truck during appellant's work. She admitted that she had called the fire chief's office and requested that it put a stop to Hunter's rides during work.

Finally, Hunter testified, pursuant to a subpoena from appellant. Hunter testified that he liked his stepmother all right; that he got to ride four wheelers, hunt, and fish while he was at his dad's; and that he would like to live with his dad. However, he also testified that he believed both his mom and dad loved him and that his mom never did anything wrong in how she treated him.

On June 22, 2007, the trial court entered an order denying appellant's petition. The court found that appellant failed to show a material change of circumstances to justify a change in custody. The trial court acknowledged that appellant loved and cared for his children and wanted to maintain a constant and caring relationship but recognized also that the children were healthy and appeared to be getting appropriate care and schooling. The court then set forth the parties' visitation, which was the standard visitation order as modified by the parties.

I.

Appellant's first point on appeal is that the trial court erred in not changing custody to him. Specifically, he contends that the court overlooked the testimony establishing that it would be in the children's best interest to be with him because he did activities with them; there would be no after-school care; appellee failed to keep him informed of medical issues; Hunter wanted to live with him; Hunter's teachers confirmed Hunter's desire to live with his dad; and phone contact was a problem.

In child-custody cases, we review the evidence de novo, but we will not reverse the findings of the trial court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003). A finding

is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). The original decree is a final adjudication that one parent or the other was the proper person to have care and custody of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). In order to promote stability and continuity in the life of the child, and to discourage repeated litigation of the same issues, modifications in custody require a more stringent standard than that of the original custody determination. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). In order to change custody, the trial court must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004) (citing *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996)). The party seeking modification of a child-custody order has the burden of showing a material change in circumstances. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). Further, there is no case in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great weight as one involving minor children. *Anderson v. Anderson*, 43 Ark. App. 194, 863 S.W.2d 325 (1993).

Appellant's arguments all concern his view of the children's best interest. However, the first element appellant must prove in order to obtain a change of custody is that there has been a material change in circumstances. *See, e.g., Jones, supra.* In this case, the trial court determined that there had been no material change in circumstances. Appellant does not

explain how the trial court's finding that there was not a material change in circumstances was clearly against the preponderance of the evidence. Moreover, while the trial court recognized that appellant loved and cared for his children and that Hunter, the parties' nine-year-old son, desired to live with his father, the trial court did not find these factors to warrant a change in custody. In a letter to the parties, the court stated that it believed that the evidence at the hearing indicated "a normal but yet not agreeable custody situation between two parents who both want what is best for their children."

After reviewing the record de novo, we do not have a definite and firm conviction that a mistake has been made; accordingly, we affirm the trial court's decision to deny appellant's petition.

II.

Appellant's second point on appeal is that the trial court erred in limiting what he could do with his children while they were with him during his visitation. Specifically, appellant challenges the following statement of the trial court at the conclusion of the hearing: "So one thing between now and whatever we do in here. No more rides in the fire truck. You know, just don't be doing that. Let's take that off the table and that way there's no more question about it." Appellant argues that there was no evidence that Hunter was endangered and contends that he has never had a wreck in the fire truck.

While we express no opinion on the wisdom of allowing a nine-year-old child to regularly accompany a team of firefighters on a fire truck to a fire, we recognize that the trial court's statement was just that: a statement during the hearing. The trial court did not include

any mention of this issue in its order. Therefore, there is no finding concerning this issue for us to review.

III.

Appellant's third point on appeal is that the trial court erred in denying his motion for reconsideration. Appellant filed a motion for reconsideration pursuant to Ark. R. Civ. P. 60(a), arguing that the trial court erred in not finding appellee in contempt concerning her denial of proper visitation during a previous spring break. Appellant also claimed that the court's findings regarding visitation were clearly erroneous (though he does not point to any specific provision). Next, appellant complained about the court's failure to address the parties' duties of communication during travel with the children and the court's failure to require a parent to notify the other parent for purposes of phone contact when the children were visiting with a grandparent. Finally, appellant contended that the trial court erred in not finding that appellee's extreme dislike for appellant was a substantial factor to be considered in her credibility. The trial court denied the motion.

Rule 60(a) provides that, within ninety days of the filing of a decree, a trial court may modify or vacate the decree to correct errors or mistakes or to prevent the miscarriage of justice. Whether to grant or deny a motion to vacate or set aside a judgment under Rule 60 lies within the trial court's discretion and will not be reversed unless the trial court has abused that discretion. *See Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004). Appellant's arguments in his motion for reconsideration were brought to the trial court's attention during the hearing on appellant's petition for modification. The trial court

considered the issues and ruled against appellant. The trial court also noted in its order that, if the parties were unable to cooperate in implementing the visitation order, as modified, it would implement the standard visitation order, without modification. This suggests that the trial court was aware of, and considered, the issues of disagreement between the parties regarding visitation. We hold that the trial court did not abuse its discretion in failing to reconsider these matters.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.